

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Daily News, LP; Chicago Tribune Company, LLC;
Orlando Sentinel Communications Company, LLC;
Sun-Sentinel Company, LLC; San Jose Mercury-
News, LLC; DP Media Network, LLC; ORB
Publishing, LLC; and Northwest Publications, LLC

Plaintiff,

v.

MICROSOFT CORPORATION, OPENAI, INC.,
OPENAI LP, OPENAI GP, LLC, OPENAI, LLC,
OPENAI OPCO LLC, OPENAI GLOBAL LLC,
OAI CORPORATION, LLC, and OPENAI
HOLDINGS, LLC,

Defendants.

Case No. 1:24-cv-03285-SHS

**PLAINTIFFS’ NOTICE OF SUPPLEMENTAL AUTHORITY IN OPPOSITION TO THE
OPENAI DEFENDANTS’ PARTIAL MOTIONS TO DISMISS (DKT. 80)**

Plaintiffs Daily News, LP (the “New York Daily News”); The Chicago Tribune Company, LLC, (the “Chicago Tribune”); Orlando Sentinel Communications Company, LLC (the “Orlando Sentinel”); Sun-Sentinel Company, LLC (the “Sun-Sentinel”); San Jose Mercury-News, LLC (the “Mercury News”); DP Media Network, LLC (the “Denver Post”); ORB Publishing, LLC (the “Orange County Register”); and Northwest Publications, LLC (the “Pioneer Press”) (collectively the “Publishers”), by and through their undersigned counsel, respectfully submit this Notice of Supplemental Authority to apprise the Court of a recent Second Circuit opinion that supports the Publishers’ opposition to the OpenAI Defendants’ partial motion to dismiss (Dkt. 80).

On August 16, 2024, the Second Circuit in *Michael Grecco Prods., Inc. v. RADesign, Inc.*, No. 23-1078, 2024 WL 3836578 (2d Cir. Aug. 16, 2024), attached hereto as Exhibit A, vacated and remanded the District Court’s order finding that Plaintiff’s copyright infringement claims were

barred by the Copyright Act's three-year statute of limitations period based on an injury-based date of accrual. The Second Circuit reiterated that this Circuit, along with ten other circuits, applies the discovery rule to copyright infringement actions, and further held that “[t]he date on which a copyright holder, with the exercise of due diligence, would have discovered an infringement” is a fact-intensive inquiry. *Id.* at *5. In reaching this holding, the Second Circuit declined to follow the district court's application of the rationale in *Minden Pictures, Inc. v. Buzzfeed, Inc.*, 390 F. Supp. 3d 461 (S.D.N.Y. 2019) (“*Minden*”).

This analysis is relevant to OpenAI Defendants' motion to partially dismiss the Publishers' direct infringement claims, which are based in part on OpenAI's creation and use of training datasets for GPT-2 and GPT-3. Dkt. 1, ¶¶ 193, 195. OpenAI Defendants moved for partial dismissal as to this aspect of Publishers' direct infringement claims on the grounds that the Copyright Act's statute of limitations period precludes these claims. Dkt. 82 at 9; Dkt. 106 at 1 (“First, notwithstanding Second Circuit law to the contrary, the Copyright Act ‘does not tolerate a discovery rule.’ Second, if the discovery rule exists, the clock starts ticking once plaintiffs have ‘cause to be put on inquiry notice,’ which can arise from mere ‘suspicion’ of an injury.”) (internal citations omitted) (citing *Minden*).

Dated: August 22, 2024

Respectfully Submitted,

By: /s/ Steven Lieberman

Steven Lieberman (SL8687)
 Jennifer B. Maisel (5096995)
 Robert Parker (*pro hac vice*)
 Jenny L. Colgate (*pro hac vice*)
 Mark T. Rawls (*pro hac vice*)
 Kristen J. Logan (*pro hac vice*)
 Bryan B. Thompson (6004147)
 ROTHWELL, FIGG, ERNST & MANBECK, P.C.
 901 New York Avenue, N.W., Suite 900 East

Washington, DC 20001
Telephone: (202) 783-6040
Facsimile: (202) 783 6031
slieberman@rothwellfigg.com
jmaisel@rothwellfigg.com
rparker@rothwellfigg.com
jcolgate@rothwellfigg.com
mrawls@rothwellfigg.com
klogan@rothwellfigg.com
bthompson@rothwellfigg.com

Jeffrey A. Lindenbaum (JL1971)
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
3 Manhattanville Rd.
Purchase, New York 10577
Washington, DC 20001
Telephone: (202) 783-6040
Facsimile: (202) 783 6031
jlindenbaum@rothwellfigg.com

Attorneys for Plaintiffs